No. 82-1898

Supreme Court of the United States

October Term, 1982

ROBERT J. KONDRAT,
Petitioner,

vs.

MELVIN G. SCHAEFER, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a group of people, excluding Petitioner, have filed a defamation suit against Respondents, and the court has determined that Respondents are to be afforded the absolute defense of truth of the statements made, is Petitioner estopped from bringing a similar suit against Respondents based on the same allegations?
2. When the statements attributed to Respondents were made within the scope of their official duties during the course of council meetings and were relevant to the subject then under discussion, are the statements absolutely privileged so as to bar a suit for defamation based thereon?
3. Where the trial court makes decisions within its vested discretion, is Petitioner denied equal protection and due process of law absent a showing of prejudice?

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OPINIONS BELOW

The Ohio Supreme Court in Case No. 83-83 on March 16, 1983, overruled Petitioner's Motion for an order directing the Court of Appeals for Lake County, Ohio, to certify its record, and *sua sponte* dismissed Petitioner's appeal for want of a substantial constitutional question.

On December 13, 1982, the Eleventh District Court of Appeals of Ohio, in Case No. 8-173, affirmed the Summary Judgment granted by the Lake County Common Pleas Court on October 17, 1980 in Case No. 77-CIV-0918.

JURISDICTIONAL STATEMENT

Petitioner filed a Petition for a Writ of Certiorari on May 9, 1983, pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No constitutional issues were raised or argued by Petitioner in the courts below.

STATEMENT OF THE CASE

Procedural Posture

Plaintiff-Petitioner (hereinafter Petitioner) filed a libel and slander action against various public officials of the City of Willoughby Hills and the Lake County Prosecuting Attorney. Named as defendants (hereinafter Respondents) were the Willoughby Hills Mayor (Schaefer), the City Law Director (Byron), the Clerk of Council (Monzula) and some of the members of City Council (DeFrank, O'Ryan, O'Donnell and Kraincic). All Respondents moved to dismiss the Complaint on various grounds. Petitioner filed briefs in opposition to the motions and reply briefs were filed by Respondents.

On March 8, 1978, Petitioner's counsel withdrew and Petitioner thereafter represented himself.

The Ohio Supreme Court, on March 27, 1978, authorized a judge from another county to preside over the case, the Honorable J. Warren Bettis.

On May 26, 1978, the court granted Petitioner thirty days to amend Counts I and II of the Complaint, granted

the Motion to Dismiss the City Law Director (Byron) and denied the Motion to Dismiss the County Prosecutor (Mitrovitch).

On June 2, 1978, a Notice of Appeal was filed concerning the granting of the Motion to Dismiss as to Law Director Byron.

On June 7, 1978, Petitioner amended Counts I and II of the Complaint.

On June 13, 1978, all the Willoughby Hills officials filed a Motion to Dismiss the Amended Complaint.

After obtaining leave of court, Respondent County Prosecutor Mitrovich filed his answer on July 31, 1981, and a Motion to Dismiss on August 7, 1978.

On September 15, 1978, Petitioner's Notice of Appeal was dismissed on the basis that the appeal was not taken from a final appealable order.

On September 29, 1978, the County Prosecutor's Motion to Dismiss was overruled.

Also on September 29, 1978, the court granted the Motion to Dismiss of Law Director Byron and found no just reason for delay.

Petitioner filed a notice of appeal on October 13, 1978, and the case was assigned Case No. 7-047 in the Court of Appeals.

Petitioner then filed a reply brief to Respondent Mitrovich's answer on October 26, 1978.

On February 20, 1979, the Respondent Willoughby Hills' Motion to Dismiss the Amended Complaint was overruled.

On February 27, 1979, a joint Answer was filed by Respondents Schaefer and the Willoughby Hills Council mem-

bers. No answer was filed on behalf of Respondent Monzula.

Requests for Admission were served on Petitioner.

The Court of Appeals reversed the dismissal of Respondent Byron in Case No. 7-047 and an Answer was filed within the trial court in his behalf on May 3, 1979.

A combined request for discovery, including Interrogatories, Requests for Admission and Request for Production of Documents (Second Set) was sent to Petitioner on May 6, 1980.

On May 12, 1980, Petitioner responded to the discovery.

A Motion for Summary Judgment was filed on behalf of all Willoughby Hills officials including Respondent Monzula on September 4, 1980. Petitioner opposed the Motion.

Petitioner filed a Motion for Default Judgment as to Respondent Monzula on October 9, 1980, and a Motion for Change of Venue on October 14, 1980.

A motion for leave to file an answer on behalf of Respondent Monzula instanter was granted on October 17, 1980, and an answer was filed.

The Motion for Summary Judgment as to all Willoughby Hills officials including Monzula was granted on October 17, 1980.

On October 22, 1980, Petitioner filed a Notice of Appeal in Case No. CA 8-134.

On January 2, 1981, the court found no just reason for delay in granting summary judgment as to the Willoughby Hills officials. Petitioner filed another appeal in Case No. CA 8-173.

On April 27, 1981, the Court of Appeals granted a Motion to Dismiss Case No. CA 8-134 for its failure to be an appeal from a final appealable order.

The Court of Appeals in CA 8-173 affirmed the decision of the trial court on December 13, 1982.

Petitioner then filed a memorandum in support of jurisdiction in the Ohio Supreme Court. On March 16, 1983, the Ohio Supreme Court overruled Petitioner's motion for an order directing the Court of Appeals to certify its record and *sua sponte* dismissed Petitioner's appeal for want of a substantial constitutional question in Case No. 83-83.

STATEMENT OF FACTS

The backdrop of the Complaint filed by Petitioner stems from an attempted recall of elected officials within the City of Willoughby Hills, Ohio.

The Complaint alleged in Count I, that on August 19, 1976, a newspaper published statements attributed to Respondent Schaefer, Mayor of Willoughby Hills, that circulators of the recall petitions were "a small self-appointed committee of losers," allegations within the circulated recall petitions were false and that the circulators of petitions were endeavoring to mislead the citizens.

Count II referred to a September 3, 1976 communication from the Willoughby Hills officials that the petition circulation had misled some residents and the communication further explained how names could be withdrawn from the part-petitions.

Count III referred to a September 15, 1976 letter from Law Director Byron to the Ohio Secretary of State regarding a request for an investigation into irregularities in the

petition circulation process. The letter was read at an open City Council meeting on September 23, 1976.

In response to Respondents' Motion to Dismiss, the court gave Petitioner leave to Amend Counts I and II of the Complaint within thirty days to show that a conspiracy to commit defamation had occurred to bring the allegations within the statute of limitations.

The Amended Complaint had five separately numbered paragraphs.

On December 18, 1976, Respondent Byron was alleged to have been quoted that deliberate misrepresentations had occurred in the recall drive.

On December 22, 1976, Petitioner alleged a newspaper quoted Law Director Byron as claiming that incidents of forgery and perjury were being contended by City officials.

On December 26, 1976, Mayor Schaefer is alleged to have made a telephone call to Thomas Sweeney, Petitioner's supervisor, at Petitioner's place of employment, to complain about Petitioner and make derogatory remarks about Petitioner.

In paragraph 4, Petitioner alleged that on March 25, 1977, a newspaper article quoted Law Director Byron as saying that funds expended in defense of the recall effort should be recouped. Petitioner then alleged that this statement was made to discredit, harass and continue the defamatory action.

Finally, in paragraph 5, Petitioner alleges that on February 23, 1978, Councilman O'Ryan made remarks at a City Council meeting that "a small group of malcontents that by using the recall process attempted to overthrow the government of Willoughby Hills" and that the state-

ment is also alleged to have been published in a newspaper. Petitioner claimed that this statement was also defamatory.

Two sets of Requests for Admission were submitted to Petitioner which went unanswered.

A Motion for Summary Judgment based upon the Requests for Admission was filed on behalf of Respondents Byron, Schaefer, DeFrank, Moorehead, O'Ryan, O'Donnell, Kraincic and Monzula.

The trial court granted Summary Judgment and the decision was affirmed by the Court of Appeals. Petitioner appealed to the Ohio Supreme Court. That court *sua sponte* dismissed Petitioner's appeal for want of a substantial constitutional question and overruled Petitioner's motion for an order directing the Court of Appeals to certify its record.

Petitioner now seeks a writ of certiorari and Respondents file this Brief in Opposition to that Petition.

ARGUMENT

I. INSOFAR AS THE ISSUE OF DEFAMATION WAS ADJUDICATED IN AN EARLIER SUIT, PETITIONER'S SUIT IS BARRED UNDER THE DOCTRINE OF RES JUDICATA.

This case stems from a suit filed by Petitioner in which he alleged that Respondents had defamed him. The alleged defamation occurred as a result of statements made by Respondents supposedly aimed at a group of residents within the City, of which Petitioner was a part concerning an election recall petition drive.

Several members of the group, excluding Petitioner, brought suit against Respondents in *Macko v. Byron,* No. 77-CIV-0620 (Lake Co.) (Exhibit A) alleging that they had been defamed by the Respondents' statements. In *Macko,* the court found that the statements allegedly made by Respondents were true, and that truth of the matter was an absolute defense to the residents' defamation allegations. *Macko v. Byron,* Opinion, pp. 9-10 (App. pp. A8-A9).

Discovery at the trial court identified the privity between Petitioner and the plaintiffs in *Macko v. Byron* pursuant to Ohio Civil Rule 36 Requests for Admission. Ohio Civil Rule 36(A), like its federal counterpart, provides that Requests for Admission for which no objections have been filed are deemed admitted. *See also: St. Paul Fire & Marine Ins. Co. v. Battle,* 44 Ohio App. 2d 261 (Cuyahoga Co. 1975). (Request for Discovery (Second Set) Requests for Admission Nos. 7, 10, and 27.)

As a result of this identity of interest, Petitioner is collaterally estopped from relitigating the very same issues which were litigated in the earlier suit.

Because the issue of the truth of the statements alleged to have been made by Respondents has been determined, Petitioner is estopped from pursuing his defamation suit. If an issue of fact or law actually is litigated and determined by a valid final judgment, the determination is conclusive in a subsequent action between the parties and their privies whether on the same or a different claim. *Hicks v. De LaCruz,* 52 Ohio St. 2d 71 (1977). An identity of the parties and their privies necessitates looking at the real parties in interest. *Trautwein v. Sorgenfrei,* 58 Ohio St. 2d 493 (1979).

Where the court in *Macko v. Byron* found that the alleged defamatory statements were true and thus afforded a complete defense to Respondents, Respondents are afforded the finding of the court in the case at bar and Petitioner may not relitigate the issue of whether the statements were true.

Therefore, Petitioner's Petition for Certiorari is barred by *res judicata* and should be denied by this Court.

II. THE CLAIMED DEFAMATORY STATEMENTS ATTRIBUTED TO RESPONDENTS WERE MADE WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES DURING THE COURSE OF COUNCIL MEETINGS, WERE RELEVANT TO THE SUBJECT THEN UNDER DISCUSSION, AND WERE ABSOLUTELY PRIVILEGED.

Petitioner's Complaint stemmed from an attempted recall of elected officials within the City of Willoughby Hills, Ohio. Generally, Petitioner alleged that he was defamed by remarks and a letter written by the Law Director, Mr. Byron, to the Ohio Secretary of State, and by statements made by Mayor Schaefer and City Councilman O'Ryan.

Uncontroverted evidence submitted to the trial court showed that the writings made by Mr. Byron consisted of a letter signed by Mr. Byron in his official capacity as Law Director of the City. That letter was read during the course of a City Council meeting pursuant to Mr. Byron's duties as Law Director and referred to irregularities in the recall petitions. Statements attributed to Mr. Byron were in reference to his advice to the City Council to attempt to recoup the money expended by the City in defending the recall action. (Affidavit of Mr. Byron and Request for Discovery (Second Set) Request for Admission No. 24.)

The uncontroverted evidence further showed that the alleged defamatory remarks made by Councilman O'Ryan pertained to statements made during the course of a council meeting which were relevant to the subject then under discussion, the irregularities in the attempted recall. (Request for Discovery (Second Set) Request for Admission No. 19.)

Statements made by a public official during the course of a council meeting and relevant to the subject matter then under discussion affords the public official an absolute privilege in the making of those remarks, and thus constitutes a complete defense to a claim of defamation. *Costanzo v. Gaul,* 62 Ohio St. 2d 106 (1980). Furthermore, a communication made by the law director of a village or municipality in his official capacity is afforded an absolute privilege. *Flynn v. Relic,* Case No. 41404 (Cuyahoga Co. Ct. App., June 26, 1980 (Exhibit B).

The writings and remarks attributed to Respondents are absolutely privileged because they were made by public officials during the course of a council meeting and were relevant to the attempted recall. Also, the letter signed by Respondent Byron is absolutely privileged because it, too, was made in Mr. Byron's official capacity as law director and related to official City affairs. Therefore, the statements alleged to be defamatory are absolutely privileged and are a bar to Petitioner's suit for defamation.

Thus, Petitioner's Petition for Certiorari should be denied.

III. PETITIONER WAS NOT DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW BY THE TRIAL COURT.

Though Petitioner's Brief is not clear, Respondents assume that Petitioner's accusations of "inferior courts disregard[ing] evidence, rules and procedures" refers to the trial court's granting of Respondent Monzula's Motion for Leave to File Answer Instanter and the trial court's determination that it need not rule on Petitioner's Motion for a Change of Venue. Neither action of the trial court denied Petitioner equal protection or due process of law.

A. The Trial Court Did Not Abuse Its Discretion in Allowing Respondent Monzula to File Her Answer Instanter and Thus Did Not Deny Petitioner Equal Protection and Due Process of Law.

Petitioner claims that he was denied equal protection and due process of law because the trial court permitted Respondent Monzula to file her Answer Instanter.

The court granted Respondent's Motion to File her Answer Instanter because the record reflected that the omission of Respondent Monzula's name from the list of seven defendants within the caption of the Answer was an oversight. Respondent Monzula had entered an appearance in her defense and participated in the hearing to the same extent as the other Respondents. Furthermore, Petitioner failed to show how he had been prejudiced by Respondent's oversight.

Ohio Civil Rule of Procedure 6(B)(2) provides that a party may request an extension of time after the expiration of a period of time and the court may exercise its discretion in granting that extension. Specifically, some

showing of excusable neglect is a necessary prelude to the filing of a late answer. *Miller v. Lint*, 62 Ohio St. 2d 209 (1980).

Where the caption in the Answer merely omitted one of seven defendants represented by the same counsel through an oversight, the court was presented with the requisite showing necessary to exercise its discretion pursuant to Ohio Civ. R. 6(B). By exercising that discretion before granting summary judgment to all Respondents, absent a showing of prejudice by Petitioner, Petitioner was not denied equal protection or due process of law.

Therefore, this Court should deny Petitioner's Petition for Writ of Certiorari.

B. When Respondents Were Awarded Summary Judgment, the Issue of Venue Became Moot and There Was No Need for the Court to Rule on Petitioner's Motion. Thus, Petitioner Was Not Denied Equal Protection or Due Process of Law.

On September 4, 1980, a Motion for Summary Judgment was filed on behalf of all Respondents. The Motion was based on uncontroverted evidence submitted to the trial court in the form of Affidavits and unanswered Requests for Discovery. Subsequently, Petitioner opposed the Motion.

On October 14, 1980, Petitioner filed a Motion for a Change of Venue.

On October 17, 1980, the court granted Respondents' Motion for Summary Judgment.

Ohio Civil Rule of Procedure 3(C)(4) provides for a change of venue "when it appears that a fair and impartial

trial cannot be had" in the court in which the suit is pending.

Once the court granted the Motion for Summary Judgment, the court knew at that point that the case would not be going to trial, and thus, there was no need for the court to determine the merit of Plaintiff's Motion for a Change of Venue.

Therefore, Petitioner was not denied due process and equal protection of the law when the court did not rule on his Motion and Petitioner's Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondents respectfully request that this Honorable Court deny jurisdiction. Petitioner is estopped from attempting to obtain yet another determination on the issue of whether Respondents were acting within the scope of their official public offices, and therefore, any remarks or writings made by Respondents are privileged and an absolute defense to a suit for defamation. Furthermore, Petitioner was not denied due process and equal protection of the law when the trial court properly exercised the discretion vested in it.

Respectfully submitted,

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APPENDIX

OHIO CIVIL RULES OF PROCEDURE

Rule 36(A)

(A) Request for admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer, or deny only a part of the matter of which an admission is

requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(C), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

Rule 6(B)

(B) Time: extension. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the

expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D) and Rule 60(B), except to the extent and under the conditions stated in them.

Rule 3(C)(4)

(4) Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.

EXHIBIT A

OPINION OF THE COURT OF COMMON PLEAS OF LAKE COUNTY, OHIO IN JOANNE MACKO, ET AL. v. BARRY M. BYRON, ET AL.

(Rendered February 14, 1980)

Case No. 77-CIV-0620

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

JOANNE MACKO, *et al*,
Plaintiffs,

vs.

BARRY M. BYRON, *et al*,
Defendants.

Transcript of the Opinion of the Court Regarding the Above Case Heard on Thursday, February 14, 1980, Before the Honorable John M. Parks, Judge of Said Court.

* * * * *

[2] The Court: Please sit down.

Ladies and gentlemen, at the close of the plaintiffs' case-in-chief, the defendant Byron made a Motion for Directed Verdict to dismiss Count III of the Amended Complaint with prejudice. This matter was argued this morning before the Court.

The Court, after thoroughly reviewing the matter, finds that it is well taken and therefore it is granted. The plaintiffs' last remaining count in their Amended Complaint is dismissed and this case is concluded.

The Court finds that the remaining defendant did not publish a libelous letter. The plaintiffs have failed to establish the necessary elements of the cause of action in libel. As a result, their case must be dismissed for the defendant has no liability.

The plaintiffs have failed to establish four essential elements of their cause of action. First, they have failed to show [3] that the letter of September 15, 1976, was libelous by aid of innuendo.

Second, the plaintiffs have not overcome the three privileges Mr. Byron possessed in this situation. These privileges were: (1) his capacity as an attorney representing the city in a lawsuit; (2) at the same time, he was a member of the executive branch of the city's government acting in his official capacity; and (3) the letter was read at an open meeting of council—city council in due course of legislative proceeding.

Third, plaintiffs Macko and Szabo are public figures in this controversy. As public figures, they may only be defamed based on a showing of actual malice, which is knowledge by the defendant of the falsity of the letter or reckless disregard for its truth. The Court finds that the allegations in the letter were true and thus actual malice was not established.

Fourth, the allegations contained in the letter of September 15th were true. Truth is an absolute defense to a libel action. A brief explanation of these legal [4] reasons for dismissal is necessary.

The first ground for dismissal is plaintiffs' failure to show an action for libel per quod. In Ohio, there have long been two types of libelous statements—libel per se and libel per quod.

Libel per se means libel of itself or upon the face of a publication, whereas libel per quod is libel by an interpretation through an innuendo between an innocent

or harmless meaning and a libelous one. Where the words of a publication are not ambiguous or uncertain as to their definition, it is the sole function of this Court to determine whether such words constitute libel per se or libel per quod.

This Court determines, as a matter of law, that Mr. Byron's letter of September 15, 1976, could only be libelous per quod. That is, it can be libelous only by way of the knowledge by some third party of the extrinsic facts of the recall movement. Where words of a publication are not of themselves libelous, but are claimed to be so by innuendo, it is for this Court to determine **[5]** whether such words may reasonably be construed as constituting libel per quod so as to present a jury question as to their meaning.

This Court determines that the words of this letter may not be reasonably construed as constituting a libel per quod or a libel per se. Thus, there is no question for the jury to consider.

A publication can be libel per quod where a third person, with knowledge of the surrounding facts finds that the reputation of the person written about, in this case the plaintiffs, had his reputation harmed, his esteem in the community lowered, or other persons were deterred from dealing with him.

The plaintiffs must also show that the defendant acted with express malice. That is, that the defendant must have published this letter with an express design to injure based on ill-will, hatred or revenge.

Lastly, a libel per quod suit requires that the plaintiffs prove special damages. **[6]** Special damages occur when particular contracts, sales, customers, patients, clients or economic opportunity are lost as a result of the defamatory statement. In other words, there must be proof of a pecuniary loss of some substantial or material advan-

tage. None of the plaintiffs have shown any of these requirements.

There has been an insufficiency of evidence by the plaintiffs to show: (1) any harm to their reputation; (2) any lowering of their esteem in the community; (3) any lost or deterred dealings with the public; (4) that Mr. Byron acted with any express malice in preparing the letter; and finally, as plaintiffs admit, they have not proved special damages. While the plaintiffs did produce evidence, by way of a third person, that the letter did refer to them, they produced no evidence that as a result of this knowledge any of the third persons felt that plaintiffs' reputations were harmed, their esteem in the community lowered or that they deterred social or business dealings with the plaintiffs. Without such evidence no [7] defamatory impact has been established.

The second basis for granting the defendant's motion is that the preparation and publication of this letter by Mr. Byron was privileged. There are three privileges that protect Mr. Byron.

First, he was an attorney representing a client in anticipation of litigation. An attorney is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as part of a judicial proceeding in which he participates as counsel.

Mr. Byron received the letter of September 9, 1976, and became aware of the impending Supreme Court suit. His letter of September 15, 1976, was a relevant communication to the appropriate authority preliminary to a proposed judicial proceeding in which, as law director, he would participate as counsel. When the letter was first prepared and later read at the council meeting, Mr. Byron was shielded by executive privilege. [8] This

privilege attaches to the members of an executive department, regardless of the level of government, if their statements, even if made with express malice, are pertinent and relevant to the matter at issue and within the scope of his responsibilities.

The final privilege that protects the defendant from any liability from the reading of the letter at the council meeting is the legislative privilege. Matters that are published in the due course of legislative proceedings and are pertinent and relevant to the matters under inquiry are absolutely privileged, even if they are made maliciously and are false. The subject matter of this letter, requesting an investigation by a neutral observer into the petition irregularities, was pertinent and relevant to the then pending or impending Supreme Court suit. City council had to inquire into a defense of that suit either at that meeting or within the near future. The matter was either under inquiry or would soon be so.

The third reason for granting Mr. **[9]** Byron's motion is the failure of plaintiffs Macko and Szabo to establish actual malice on the part of the defendant in writing the letter.

These two plaintiffs are public figures for they have thrust themselves to the forefront of a particular public controversy in order to influence the resolution of the issues involved. In fact, Mrs. Macko and Mr. Szabo created this controversy by initiating the recall campaign. As public figures, they may only recover damages for libel upon a showing of actual malice.

Actual malice is, in this regard, knowledge by the defendant that the allegations in the letter were false or a reckless disregard on the part of Mr. Byron as to the letter's truthfulness. Plaintiffs have shown neither of these elements.

The evidence has disclosed that the incidents referred to in the letter were true and that the defendant prepared this letter only after the mayor and other members of council conducted preliminary investigation [10] discovering these admitted irregularities. This evidence does not establish reckless disregard for the truth.

The final basis for dismissing this suit is the absolute defense to any libel action—the truth of the matter alleged or stated. Plaintiffs themselves admitted that the incidents referred to in the letter did in fact occur. They were true. Truth of the matter defeats any claims of libel of imputation of a crime. The fact that the indictments were dismissed does little to rebut plaintiffs' own admissions that the acts alleged in the letter were true and were committed by the plaintiffs.

For these reasons, the suit must be dismissed against the plaintiffs, even after construing the evidence most strongly in favor of them. The Court finds that on these determinative issues, reasonable minds can come to only one conclusion upon the evidence submitted and that conclusion is adverse to the plaintiffs.

The jury is hereby discharged and the suit is dismissed with prejudice. The [11] plaintiffs will bear the costs of this action.

* * * * *

EXHIBIT B

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO IN LAWRENCE J. FLYNN v. JOHN D. RELIC, ET AL.

(Dated June 26, 1980)

No. 41404

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

LAWRENCE J. FLYNN,
Appellant,

vs.

JOHN D. RELIC, *et al.*,
Appellees.

JOURNAL ENTRY AND OPINION

STILLMAN, *P.J.*:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On June 23, 1978, Lawrence J. Flynn instituted an action for libel and slander by filing a complaint against John D. Relic and Lawrence I. Byrnes in the Cuyahoga County Common Pleas Court. The complaint alleged that

on June 23, 1977, John D. Relic, Finance Director of Mayfield Village, and Lawrence I. Byrnes, Law Director of Mayfield Village, drafted and filed before the Council of Mayfield Village a document entitled "Complaint By Finance Director Upon Affidavit" which accused Lawrence J. Flynn, a councilman, of forgery, in violation of R.C. 2913.31, having an unlawful interest in a public contract, in violation of R.C. 2921.42(A), and dereliction of duty, in violation of R.C. **[2]** 2921.44(E). The complaint further alleged that the charges leveled against Flynn were unwarranted, false, libelous, slanderous, deceitful, purely political, and made maliciously. The complaint also alleged that the charges were published in newspapers and on radio and television thereby causing Flynn to experience embarrassment, mental anguish, nervousness, sleeplessness, and humiliation. The complaint included a request for compensatory damages in the amount of fifty thousand dollars and punitive damages in the amount of one hundred thousand dollars.

Relic and Byrnes filed an answer on August 1, 1978, admitting that in June of 1977, they presented to the Council of Mayfield Village a document which charged Flynn with several violations of state law. Relic and Byrnes denied the remaining allegations contained in Flynn's complaint. As defenses, Relic and Byrnes asserted that they had acted within the scope of their duties and authority and that there had been probable cause for the charges.

On December 1, 1978, Relic and Byrnes filed a third-party complaint against Mayfield Village, seeking reimbursement for any amount that might be recovered by Flynn. Mayfield Village submitted an answer on January 24, 1979, denying liability.

On June 1, 1979, Relic and Byrnes filed a motion for summary judgment. The motion was supported by seven exhibits, including the "Complaint By Finance Director Upon Affidavit", which stated:

> Complainant Finance Director, being duly sworn, states that John D. Relic has filed an Affidavit, a copy of which is attached hereto, stating that Lawrence J. Flynn on or about December 26, 1975 presented an invoice to Mayfield Village for the payment of services to T. Hansen in the amount of $594.25 which invoice was a forgery in violation of Revised Code Section 2913.31; that said invoice was designed to conceal an interest **[3]** of Lawrence J. Flynn in the profits or benefits of a public contract with Mayfield Village, in violation of Revised Code Section 2921.42 (A)(4); that said Lawrence J. Flynn while serving as a Councilman of Mayfield Village was served a notice in writing on or about April 14, 1976 to appear with or without counsel to testify before the Finance Committee of Mayfield Village on April 29, 1976 at 7:30 p.m. with regard to the "T. Hansen" invoice; that he failed to appear which refusal is a violation of his oath of office, gross misconduct and malfeasance in office in violation of Revised Code, Section 2921.44 (E).

Relic and Byrnes maintained that the pleadings and exhibits demonstrated that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law for the reason that the communication, namely the "Complaint By Finance Director Upon Affidavit", had been absolutely privileged. On June 18, 1979, Mayfield Village joined in the motion for summary judgment.

On July 5, 1979, Mayfield Village filed a suggestion of death, informing the court that Relic had died on June 21, 1979. On July 13, 1979, Relic's attorney filed a supplemental brief in support of the motion for summary judgment, contending that pursuant to R.C. 2311.21, Flynn's action abated as to Relic on the date of Relic's death.

On August 9, 1979, Flynn filed a motion to substitute party defendant, requesting the court to revive the action against Relic's executrix, Lillian J. Relic. Thereafter, Flynn submitted a brief in opposition to the motion for summary judgment. The brief was accompanied by an affidavit which stated:

> I, LAWRENCE FLYNN, being first duly sworn depose and say that:
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> 1. I am a Councilman for Mayfield Village and was same on June 23, 1977 when a complaint was filed against me;
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> 2. I never misrepresented or fraudulently induced the Village into paying for services rendered by me;
>
> **[4]** 3. Each and every charge brought against me is untrue and not based on actual conduct or omissions by this affiant;
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> 4. Based on personal knowledge, I believe the charges were inappropriate, unnecessary, polital[sic], malicious, fraudulent and made without legislative authority.

In the brief, Flynn argued that his cause of action against Relic had survived the death of Relic. Flynn further argued that the defense of absolute privilege was not available to Relic and Byrnes.

The court granted the motion for summary judgment on September 4, 1979. In its journal entry, the court stated:

> Defendants' Motions for Summary Judgment heard: Granted as to both defendants. Abated by death of John D. Relic pursuant to R.C. 2311.21. Complaint is dismissed at plaintiff's costs.

Flynn timely filed a notice of appeal. One error has been assigned:

> The Trial Court erred by granting Summary Judgment in favor of the defendant-appellees:
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> A. The evidence before the trial court raised genuine issues as to whether or not the defendant-appellees were absolutely privileged from liability for their acts.
>
> B. The death of defendant-appellee Relic merely necessitated the reinstating of the claim against the deceased's executrix and same was duly complied with.
>
> C. The death of defendant-appellee, Relic, did not abate the claim for relief then pending against the codefendant-appellee.

With respect to the issue of abatement, the common-law rule was that upon the death of a party, a pending action, as it related to the deceased party's interest, abated, and if the cause of action itself survived death, a new action had to be commenced by or against the personal representative of the deceased party. *Carter v. Jennings* (1873), **[5]** 24 Ohio St. 182; *Chilcote v. Hoffman* (1918), 97 Ohio St. 98; *Joyce v. Columbus* (1936), 21 Ohio Law Abs. 649. The common-law rule was modified by R.C. 2311.21, which states:

> Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a county court for misconduct in office, which shall abate by the death of either party.

Thus, R.C. 2311.21 retains the common-law rule as to an action for libel or slander. Applying the statute, the Ohio Supreme Court has held that where a defendant in an action for slander dies during the pendency of the action, the action abates. *Billingsley v. Townsend* (1937), 132 Ohio St. 603.

An action which abates under R.C. 2311.21 can be brought anew by or against the decedent's personal representative only if the cause of action survives death. *Joyce v. Columbus, supra.* R.C. 2305.21, which is concerned with survival of causes of action, provides:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

A cause of action for libel or slander did not survive at common law. *Long v. Hitchcock* (1827), 3 Ohio 274. Survival under R.C. 2305.21 depends upon whether or not a cause of action for libel or slander constitutes an action for "injuries to the person".

In construing similar statutes, courts in other jurisdictions have held that the term "injuries to the person" means physical injuries. *Billingsly v. St. Louis, I.M. &*

S. Ry. Co. (1907), 84 Ark. 617; *Reed v. Real Detective Pub. Co.* (1945), 63 Ariz. 294. The court in *Reed v. Real* **[6]** *Detective Pub. Co., supra,* concluded the term "injuries to the person" does not encompass injuries to character or reputation, such as libel.

We find the reasoning of *Billingsly v. St. Louis, I.M. & S. Ry. Co., supra, and Reed v. Real Detective Pub. Co., supra,* persuasive. We note that the Ohio Supreme Court has declared that an action for malicious prosecution is not one for "injuries to the person" and therefore does not survive under R.C. 2305.21. *State ex rel. Crow v. Weygandt* (1959), 170 Ohio St. 81. Accordingly, we conclude that an action for libel or slander does not constitute an action for "injuries to the person" and therefore does not survive the death of the person wronged or the tortfeasor.

In the instant case, Lawrence J. Flynn brought an action for both libel and slander against John D. Relic and Lawrence I. Byrnes. Relic died during the pendency of the action. Thus, the action abated as to Relic, pursuant to R.C. 2311.21. Since a cause of action for libel and slander does not survive under R.C. 2305.21, Flynn is precluded from commencing a new action against Relic's executrix or substituting her as a party.

We find that the trial court did not err in granting summary judgment as to Relic on the ground that the action abated. However, the court erred in entering summary judgment in favor of Byrnes on the basis of abatement.

We must next determine whether or not Byrnes enjoyed an absolute privilege as to the communication made to the Council of Mayfield Village. It is well settled that

absolute privilege applies to legislative proceedings, judicial proceedings, official acts of the executive offices of state or nation and acts done in the exercise of military or naval authority. *Bigelow v. Brumley* (1941), 138 Ohio St. 574; *McChesney v. Firedoor Corp.* (1976), 50 Ohio App. 2d 49. Courts have extended the **[7]** absolute privilege to a statement made by a board of county commissioners relative to official acts of the county surveyor [*Tanner v. Gault* (1925), 20 Ohio App. 243], to statements made by the mayor and chief of police of a village in connection with a tavern operator's request for renewal of a liquor permit [*Shade v. Bowers* (1962), 93 Ohio Law Abs. 463], and to utterances made by members of local governing bodies during the course of official proceedings [*Costanzo v. Gaul* (1980), 62 Ohio St. 2d 106]. Accordingly, we conclude that a communication made by the law director of a village or municipality in his official capacity should be afforded an absolute privilege.

In the present case, Byrnes advised Relic to submit the matter of the propriety of Flynn's invoice to the Council of Mayfield Village for consideration. Byrnes also assisted Relic with the preparation of the "Complaint By Finance Director Upon Affidavit". In so doing, Byrnes acted in his capacity as the chief legal advisor and attorney for Mayfield Village and its officers and departments. Thus, Byrnes enjoyed an absolute privilege as to the "Complaint By Finance Director Upon Affidavit".

We find that the trial court did not err in entering summary judgment in favor of Byrnes on the basis of absolute privilege.

Accordingly, the judgment is affirmed.

[8] It is ordered that appellee(s) recover of appellant their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, *J.*, (See attached concurring opinion, DAY, *J.*) and PARRINO, *J.*, concur in judgment only.

/s/ SAUL G. STILLMAN
Presiding Judge

DAY, *J.*, concurring in judgment only:

The majority opinion overrules the decision of the Supreme Court of Ohio decided in 1928 and followed by this court in 1952 establishing the Ohio rule on the abatement of pending actions and survival of causes of actions. Those cases make it perfectly clear that libel and slander are injuries to the person, see *Smith v. Buck* (1928), 119 Ohio St. 101 at 103-109, and therefore survives under R.C. §2305.21.

The crucial Syllabus in *Smith* completely supported by the text, states:

> "2. The words 'personal injury' by 'wrongful act,' of Section 11819, General Code, comprehend, among other injury to the person, injury by libel or slander."

That Section 11819, General Code, is a statute governing attachments is not a ground for distinguishing the meaning

of the same or equivalent words in R.C. §2305.21. This is the obvious conclusion from *Pecyk* where it was said:

> **[2]** "Upon the death of Walter Pecyk, the action, under Sec. 11397, G.C., abated and was dismissed. Thereafter, the . . . administrator of the estate of Walter Pecyk, filed, under favor of Sec. 11235, G.C. [the predecessor of R.C. §2305.21], an action against Semoncheck for the injury to the 'person' of Walter Pecyk by reason of the alleged slander. See *Smith v. Buck,* 119 Ohio St. 101, 162 N.E. 382, 61 A.L.R. 1343." (Brackets added.)

Unless we are prepared to use Arkansas and Arizona precedents to overrule the Supreme Court of Ohio and our own prior decisions, the majority position on the survival of causes of action should be abandoned.

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1. In implicit accord *Pecyk v. Semoncheck* (8th Dist. App. 1952), 105 N.E. 2d 61, 62.